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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 FACEBOOK, INC. and MARK
ZUCKERBERG,

16 Plaintiffs,

17 v.

18 CONNECTU, INC. (formerly known as
19 CONNECTU, LLC), CAMERON
WINKLEVOSS, TYLER WINKLEVOSS,
20 DIVYA NARENDRA, PACIFIC
NORTHWEST SOFTWARE, INC.,
21 WINSTON WILLIAMS, WAYNE CHANG,
and DAVID GUCWA AND DOES 1-25,

22 Defendants.
23

Case No. 5:07-CV-01389-RS

**PLAINTIFFS' OPPOSITION TO
PACIFIC NORTHWEST SOFTWARE
AND WINSTON WILLIAMS'
MOTION TO DISMISS FOR LACK
OF PERSONAL JURISDICTION**

Date: July 11, 2007
Time: 9:30 A.M.
Judge: Honorable Richard Seeborg

24 **PUBLIC-REDACTED VERSION**
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1 **I. INTRODUCTION**

2 Pacific Northwest Software (“PNS”) and Winston Williams (“Williams”) are subject to
3 the jurisdiction of this court. While PNS and Williams claim they have little or no contact with
4 California or with the specific acts causing harm to plaintiffs in California, the facts tell a
5 different story.

6 Under any reasonable interpretation of specific jurisdiction case law, PNS and Williams
7 are subject to the jurisdiction of this court. Both PNS and Williams targeted Californians when
8 inflicting their harm. They helped write a computer program called “Facebook Importer” that
9 was created to harvest email addresses from Facebook’s California-based website, including its
10 tens of thousands of registered users who were students at California schools. They even
11 documented the extraction of email addresses from California schools. Both PNS and Williams
12 hosted the program on their computers. Williams and PNS, along with the other defendants,
13 attempted to hide their activity by selecting randomized proxy servers to attack Facebook. Some
14 of these servers were based in California. PNS, Williams, and the other defendants then used the
15 email addresses to spam registered Facebook users (and the registered users of three other major
16 California-based social networks) in California.

17 PNS is also subject to the general jurisdiction of this Court. PNS’ California-based clients
18 have been a substantial part of PNS’ business. PNS has operated regularly and continuously in
19 California through both an independent contractor and a resident quality assurance director whose
20 staff was also located in California. PNS has entered into contracts with California companies,
21 including Google and Craigslist, with California choice of venue obligations. PNS
22 representatives regularly travel to California, contact parties in California, and engage in business
23 in the state. Finally, PNS has a substantial ownership interest and business relationship with San
24 Francisco-based The Records Portal Company.

25 Given the substantial role of PNS in the California economy, the intentional targeting of
26 Facebook by PNS and Williams in California, and the subsequent spamming of California
27 residents orchestrated with the assistance of PNS and Williams, jurisdiction should be exercised
28 over these parties.

1 **II. FACTS**

2 PNS' and Williams' purposeful activities against Facebook are sufficient to support
3 minimum contacts necessary for specific jurisdiction. Moreover, when those actions are
4 considered in conjunction with PNS' independent, systematic and regular activities within
5 California, general jurisdiction can also be properly found.

6 **A. PNS and Williams' Participated in Activities Directed Towards Californians**
7 **and Related to This Lawsuit.**

8 **1. Facebook Background**

9 Facebook is a social network website created in February 2004 to link college students
10 together. Decl. of Monte Cooper In Supp. of Opp'n to Mot. to Dismiss ("Cooper Decl.") Ex. 1 at
11 119:6-120:20. One of the first three colleges to operate on the site was Stanford University. *Id.*
12 Ex. 1 at 132:15-133:14; Ex. 2. In June 2004, Zuckerberg relocated Facebook to Silicon Valley,
13 where it eventually incorporated. *Id.* Ex. 1 at 93:13-94:10, 193:6-11; Ex. 3. As of August 9,
14 2004, Facebook used servers located in California to host the website. *Id.* Ex. 1 at 165:13-166:4;
15 Ex. 4. Facebook, Inc.'s principal place of business has, at all times since at least February 2005,
16 been in Palo Alto. *Id.* Ex. 1 at 214:23-215:8; Ex. 5. Facebook's popularity exploded, and by July
17 3, 2005, the website had 2.8 to 3 million registered users, many of them students at California
18 schools. *Id.* Ex. 1 at 245:22-246:12; Ex. 6.

2. ConnectU's Initial Attempts to Circumvent Facebook's Security

ConnectU was formed by Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra. *Id.* Ex. 7; Ex. 8 at 1, 6. In May 2004, ConnectU engaged iMarc LLC to build a website to compete with Facebook. *Id.* Ex. 9 at 30:21-31:9. The popularity of Facebook prompted ConnectU’s founders to instruct iMarc to “copy Facebook.” *Id.* Ex. 10 at 12.¹

Once iMarc built the ConnectU website, ConnectU’s founders tried to build its user base by acquiring “fast and free” the email accounts of Facebook’s registered users, as well as other information, such as course data, that Facebook gathered for its students. *Id.* Ex. 9 at 67:9-70:6; Ex. 10 at 798; Ex. 14 at 3865-69.

Id. Ex. 9 at 72:17-76:25; Ex. 11 at 24:10-26:25; Ex. 12 at 30:21-31:11; Ex. 13 at 43:16-44:10, 45:9-47:6. They also engaged friends to surreptitiously harvest email addresses of Facebook users. *Id.* Ex. 10 at 659.

Realizing that manual efforts to take information was ineffective, ConnectU’s founders asked iMarc to develop a software program to gain unauthorized access to the Facebook site and substitute the user’s ID “with [other users’ ID] numbers to grab people’s email addresses.” *Id.* Ex. 10 at 798. iMarc’s software engineers refused to do so because they were concerned the email addresses would be used for unlawful spamming. *Id.* Shortly afterward, as iMarc suspected, ConnectU’s founders spammed “thousands” of students whose email addresses had been taken from Facebook with invitations to join ConnectU. *Id.* at 622. Every one of the invitations used false header information – what iMarc’s engineers described as “a bogus ‘From’ address” – from the fictitious students god@harvard.edu, jstarr@georgetown.edu, jstarr@amherst.edu, and jstarr@dartmouth.edu. *Id.*

¹ Exhibit 10 is a compilation of various emails produced by iMarc LLC. Because the jurisdictional discovery cites are extensive and many concern confidential information, Facebook has compiled multiple documents from individual productions as the Exhibits attached to the Declaration of Monte Cooper as Exhibits 10 (iMarc), 14 (ConnectU), 18 (David Gucwa), 19 (PNS), 20 (Wayne Chang exemplars), and 25-26 (ConnectU by different production). References to cites in these exhibits are to the Bates Number. *E.g.*, “Ex. 19, at 2096” refers to the document with the bates-number PNS02096.

Id. Ex. 14 at 7512-17.

3. PNS and Williams Are Hired to Engage in Unlawful Activity

Because iMarc would not engage in unlawful activity, ConnectU hired Defendants PNS and Chang in late 2004 and early 2005 to develop the program iMarc refused to create. The program was named “Importer”, and was both written and implemented well after Facebook had re-located in California and incorporated. Importer was part of a broader effort to expand the ConnectU platform. It was designed to harvest Facebook email addresses for spamming via a system called “Social Butterfly.” *See id.* Ex. 9 at 107:2-24; Ex. 15 at 148:20-150:13; Ex. 16 at 72:2-73:20, 86:23-88:21; Ex. 17 at 19:14-20:9; Ex. 18 at 22-25 (15:03:25-18:44:27); Ex. 19 at 1766-77. *Id.* Ex. 17 at 45:14-49:12, 65:9-69:13, 156:17-157:14, 159:23-16:15. Essentially, Importer was used to access Facebook servers in California and steal California users’ email addresses and other profile information from the Facebook website.

. *Id.* Ex. 19 at 1766-77, 571135; Ex. 21 at 239:20-23. Of those, at least five of PNS’ employees, engineers and consultants — Defendants Williams, Gucwa, and Chang, as well as Joel Voss and John Taves — actively participated in the development and implementation of the Importer and Social Butterfly programs. *Id.* Ex. 14 at 8392; Ex. 16 at 30:6-31:10, 58:8-60:13, 101:15-103:11; Ex. 18 at 48 (11:29:31-11:30:03); Ex. 19 at 15.

Id. Ex. 14 at 9887, 11073; Ex. 19 at 15, 2096.

² *Id.* Ex. 19, at 15. Williams actively participated in every stage of Importer’s design and development . *Id.* Ex. 9 at 85:22-87:3; Ex. 15 at 148:20-151:3; Ex. 22 at Nos. 3, 4; Ex. 23 at No. 17.1.

Id. Ex. 14 at 6537, 8392; Ex. 18 at 134; Ex. 19 at 842-43, 1238. *Id.* Ex. 14 at 9768-69.

² Williams’ involvement is detailed in the following section.

1 **a. Importer Harvests Facebook Data**

2 Importer harvested Facebook user personal information, including email addresses, sent
3 those Facebook users unsolicited emails with false headers, and added the stolen user data to
4 ConnectU's databases. *Id.* Ex. 16 at 101:15-103:11; Ex. 18 at 22 (15:16:29-15:18-24), 23
5 (15:19:07-16:07:54); Ex. 19 at 2096.

b. **Crawler Is Implemented to Extract Further User Data**

Id. Ex. 19 at 2096.

Crawler retrieved Facebook user ids and then grabbed the profile information for each id in order to import email addresses associated with the user's "friends." *Id.* Ex. 18 at 75 (16:44:12–17:02:47).

Id. Ex. 19 at 1768-69.

Id. at 1769.

See, e.g., id. Ex. 14 at 10359, 8392, 8657; Ex. 19 at 1767-69, 310455, 310177-79, 310185-86. The database log generated on PNS' computers by the importer/crawler code establishes this fact.

3

Cooper Decl. Ex. 19 at 310177 (log generated by the code in Cooper Decl. Ex. 19 at 281469-73).

Id.

Id.

Id. Ex. 1 at 244:5-19.

Id. Ex. 19 at

³ Claremont-McKenna College is located outside Los Angeles, California.

281472-73, 310177.

Id. at 310177.

c. **Crawler and Importer Are Used With a Third Program to Spam Californians**

Importer and Crawler were also used by a third tool created by PNS and Williams branded “Social Butterfly.” Using the imported email addresses from Facebook that had been grabbed and scanned, PNS and Williams then programmed Social Butterfly to send invitations to Facebook’s registered users to join ConnectU. *Id.* Ex. 15 at 148:20-150:16; Ex. 16 at 124:19-127:25; Ex. 19 at 2096; Ex. 25 at 1380-83; Ex. 26 at 2972.

Id. Ex. 1 at

241:8-242:24; Ex. 26 at 172.

Id. See also Ex. 19 at 310177.

Id. Ex. 1 at 241:8-244:1.

d. **PNS and Williams Target Other California Users**

Id. Ex. 16

at 93:25-95:1, 210:22-212:15; Ex. 19 at 2096. This permitted PNS, Williams and the other Defendants to reach even more California residents and citizens.

e. **PNS and Williams Fully Appreciated the Wrongfulness of Their Activities and Directed Electronic Attacks at Facebook Nonetheless**

Id. Ex. 10 at 798; Ex. 14 at 4243; Ex. 19 at 15, 842-43. From the beginning, they acknowledged that they would have to play “cat and mouse” because, “once thefacebook” caught on, Facebook would “shut out [their] script.” *Id.* Ex. 18 at 23 (16:08:06–16:09:10).

Id. Ex. 1 at 241:8-

244:1; Ex. 19 at 842-43, 281472-73, 310177.

Id. Ex. 19 at 1767.

Id.

Id.

Id. Ex 16 at 58:3-18; Ex. 19 at 571138 (“ ”).

In May, 2005, reflecting on the combined efforts of Williams, PNS, the development team, and ConnectU,

Id. Ex. 19 at 15

(emphasis added).

Id. Ex. 26 at 2972.

B. PNS Has a California Presence

Beyond the repeated and extensive contacts PNS developed with California, in general, and Facebook, in particular, through its development and hosting of Importer and Social Butterfly and the millions of files it downloaded and millions of invitations it sent, PNS also has substantial, continuous and systematic contacts with the state via other business.

In support of its Motion to Dismiss, Taves wrote that PNS does not “own” any office space in California. Taves Decl., ¶¶ 4-5. PNS’ website boasts, however, that it “provides virtual development teams to many companies,” including in California. Cooper Decl. Ex. 27. As set forth below, PNS’ presence – virtual or otherwise -- in California is substantial and continuous.

1. PNS Operates Its Business From California

Id. Ex. 21

at 249:24-250:4, 251:16-22.

Id. at

233:17-19.

Id. at 249:24-

250:2, 233:17-23, 251:12-15, 228:11-229:1, 250:20-22.

Id. at 251:25-252:13.

Id. at 246:6-20.

Id. at 247:11-15.

Id. at 234:1-4, 249:3-5. Deacon's staff included, at least, David Perkins, Fred Pampo, Joel Stair, and Sam Oh, all of whom are California residents. *Id.* Ex. 19 at 386; Ex. 21 at 255:16-256:2; Ex. 22 at No. 2.

Id. Ex. 19 at 386.

Id. at 1149.

Id. Ex. 21 at 248:16-25.

2. PNS Has Contracts with Many California Customers

PNS has several California-based clients, which have generated at least \$600,000 for PNS in the last two years. Cooper Decl. Ex. 21 at 306:24-307:1; Ex. 22 at No. 2. PNS' California-based income amounts to approximately 7.5% of the total revenue generated by PNS since its inception, and approximately 33% of its average annual gross revenue.⁴ Since 2005, PNS has had relationships with the following California companies: Southern California's Chula Vista Elementary School District (developing 50 websites in 43 district schools for \$64,449) (*id.* Ex. 19 at 400; Ex. 21 at 288:3-7; Ex. 22 at No. 2; Ex. 30); Los Angeles' Application Science and Technology (AST) (developing website for \$103,646) (*id.* Ex. 19 at 387; Ex. 22 at No. 2); San

⁴ In his declaration, Taves suggested that only 2% of PNS' revenue could be attributed to PNS' California business. Taves Decl., ¶ 11. In PNS' deposition, Taves testified

Cooper Decl. Ex. 21 at 237:18-238:13, 258:5-20, 270:7-271:7. This is not the first time false factual statements have been made in this case with respect to jurisdiction. At the case management conference, Facebook will discuss a more serious and alarming situation with other defendants related to a jurisdictional challenge in this case which will likely give rise to a motion for sanctions.

Diego's Wireless Knowledge, Inc. (website development services for \$200,000) (*id.* Ex. 21 at 305:22-306:2, 306:24-307:1)⁵; Examcrackers (website development for at least \$83,270) (*id.* Ex. 22 at No. 2; Ex. 31); Know-the-Course(website development for \$30,500) (*id.* Ex. 22 at No. 2; Ex. 32); City Ticket Exchange, located in California (website development for \$37,000) (*id.* Ex. 22 at No. 2; Ex. 33); Nomad Cows (\$12,000 for services), Michele Miller (\$3,375 for services), Chadstar (\$47,427 for services), and New Country Financial (\$12,150 for services) (*id.* Ex. 22 at Nos. 1-2).

In addition to the extensive California client list above, one company is worthy of particular note.

Id. Ex. 19 at 398.

Id.

Id.

Ex. 19 at 398; Ex. 21 at 266:25-5. Mike Hayner, a PNS principal, is a member of Records Portal's management team (*id.* Ex. 28), and PNS is the administrative contact for Records Portal's domain registration. *Id.* Ex. 19 at 398; Ex. 29. Records Portal was not listed in PNS' interrogatory responses as a California-based contact. *Id.* Ex. 22 at Nos. 1, 2.

3. PNS Has Entered Into Additional Contracts With California Businesses

PNS entered into at least one contract each with Google and craigslist.com, both California-based companies. *Id.* Ex. 21 at 249:7-13; Ex. 34.

Id. Ex. 19, at 768; Ex. 21 at 277:4-17. An agreement is required in order to post advertisements on Google's website. *Id.* Ex. 34.

Id. Ex. 19 at 768.

Id. Ex. 21 at 288:10-18. In order to use Craigslist, PNS was required to agree to Craigslist's Terms of Use, which are governed by California law. *Id.* Ex. 35.

⁵ PNS did not include Wireless Knowledge in its interrogatory response as a California contact. When questioned about this omission, Taves stated he made no effort to consult with his colleagues or review PNS' records to determine if its interrogatory responses were complete and accurate. Cooper Decl. Ex. 21 at 303:13-307:21.

1 out-of-state defendant purposefully directed its activities toward residents of the forum state or
 2 otherwise established contacts with the forum state; 2) that the plaintiff's cause of action arises
 3 out of or from the defendant's forum-related contacts; and 3) that the forum's exercise of personal
 4 jurisdiction in the particular case is reasonable. *Brainerd v. Governors of the Univ. of Alta.*, 873
 5 F.2d 1257, 1259 (9th Cir. 1989).⁶ These standards are to be applied "flexibly." *See Ochoa v. J.B.*
 6 *Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1188 n.2 (9th Cir. 2002). When applying this
 7 standard to a corporation, such as PNS, contacts can be assessed according to the contacts of its
 8 agents and employees. *Int'l Shoe v. Washington*, 326 U.S. 310, 316-317 (1945). If the acts of
 9 PNS' agents and employees are within the course and scope of their employment, their acts will
 10 be attributed to the corporation for jurisdictional purposes. *See id.*

11 Defendants incorrectly argue that to prove jurisdiction Facebook must show that they
 12 "purposefully availed themselves of the benefits and protections of California law." Mot. to
 13 Dismiss at 5. Rather, courts exercise jurisdiction over defendants in tort actions where
 14 defendants' act has an effect in the forum state, even if the act itself takes place outside state
 15 boundaries. *Schwarzenegger*, 374 F.3d at 802-03.

16 **1. Defendants Have Purposefully Directed Their Activities Toward**
 17 **Facebook In California**

18 "A showing that a defendant purposefully directed his conduct toward a forum state ...
 19 usually consists of evidence of the defendant's actions outside the forum state that are directed at
 20 the forum. . . ." *Schwarzenegger*, 374 F.3d at 803. "Purposeful direction" is established by (1)
 21 Defendants' commission of an intentional act; (2) Defendants' express aiming at the forum state;
 22 and (3) Defendants' causing harm that they know is likely to be suffered in California.
 23 *Id.*, citing *Calder v. Jones*, 465 U.S. 783 (1984). Defendants' acts meet all three parts.

24 **a. PNS and Williams Committed Intentional Acts**

25 Defendants intentionally tried to harvest email addresses of California college students

26 ⁶ When a defendant purposefully directs activities into the forum, personal jurisdiction is
 27 presumed to be reasonable. *Brainerd*, 873 F.2d at 1260, citing *Burger King*, 471 U.S. at 477; *see*
 28 *also Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002) citing *Compuserve, Inc. v. Patterson*, 89
 F.3d 1257, 1268 (6th Cir. 1996).

1 from a California based website service using (at times) California proxy servers, and then sent
 2 them unsolicited email. *See Schwarzenegger*, 374 F.3d at 806. Defendants incorrectly argue their
 3 actions were random, fortuitous or attenuated contacts over which they had no control. *See*
 4 *Calder*, 465 U.S. at 789. To be sure, PNS and Williams “are not charged with mere untargeted
 5 negligence. Rather, their intentional, and ... tortious, actions were expressly aimed at California”
 6 as well as elsewhere *Id.* *See, e.g.*, Cooper Decl. Ex. 10 at 798; Ex. 14 at 4243; Ex. 18 at 22
 7 (15:16:29-15:18-24), 23 (15:19:07-16:07:54); Ex. 19 at 15, 842, 2096, 310177; Ex. 26 at 172.
 8 Specifically, Facebook alleges that Defendants (1) provided a means for accessing Facebook’s
 9 computers (FAC ¶¶ 17, 29); engaged in unauthorized access of the Facebook website (FAC ¶¶ 18,
 10 19, 27); (3) took extensive amounts of data from Facebook’s computers (FAC ¶¶ 18, 28, 34, 53);
 11 (4) used the pilfered data (FAC ¶¶ 22, 29, 34); and (5) sent unsolicited commercial email to
 12 California residents (FAC ¶¶ 22, 43, 52). These allegations alone are sufficient to meet the first
 13 prong of the effects test. *Dole Foods v. Watts*, 303 F.3d 1104, 1111-12 (9th Cir. 2002) (holding
 14 that allegations of intentional acts are sufficient to satisfy first prong of the *Calder* test).

15 In addition, jurisdictional discovery has shown that PNS and Williams designed and
 16 implemented the software utility to access the Facebook website without authorization and to
 17 steal email account information from Facebook while Facebook was operating in California.
 18 Cooper Decl. Ex. 14 at 10359, 8392; Ex. 16 at 59:3-18; Ex. 19 at 2096, 310455. Such access
 19 was gained by repeated and deliberate circumvention of Facebook’s security mechanisms. *Id.* Ex.
 20 14 at 4243, 11039; Ex. 16 at 101:15-104:20; Ex. 18 at 22 (15:16:29-15:18-24), Ex. 23 (15:19:07-
 21 16:07:54), 56 (11:48:39–11:53:44).

22
 23 *Id.* Ex. 1 at 244:5-19; Ex. 10 at 798; Ex. 14 at 4243; Ex. 18 at 22 (15:16:29-15:18-
 24 24), 23 (15:19:07-16:07:54); Ex. 19 at 15, 842, 2096, 310177; Ex. 26 at 172.

25
 26 *Id.* Ex. 19 at 1768-69.

27
 28 *Id.* Ex. 1 at 241:8-242:25; Ex. 15 at 148:20-

150:16; Ex. 16 at 124:19-127:25; Ex. 19 at 2096, 310177; Ex. 25 at 1380-83; Ex. 26 at 172, 2972.

b. PNS and Williams Aimed and Caused Harm to Californians.

PNS and Williams expressly aimed their conduct at Facebook in California and caused the intended harm. Courts find express aiming (and therefore specific jurisdiction) “where the defendants knew that their actions would have a potentially devastating effect on the plaintiff, who resided in California, and that the brunt of the injury caused by their actions would be felt in California.” *Brainerd*, 873 F.2d at 1259, *citing Calder*, 465 U.S. at 790. *See also Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

PNS and Williams’ actions were expressly aimed at Facebook, which was operating in California, and were even partially generated from California servers. *See Goldberg v. Cameron, et al.*, 482 F. Supp. 2d 1136, 1145-46 (N.D. Cal. 2007) (Whyte, J.) (express aiming requirement satisfied by defendants’ intentional scheme against plaintiff, designed to have “worldwide” effect, including in California, even though defendants did not know that the plaintiff was within the specific district). PNS, operating through its contractors and employees, knowingly facilitated repeated attacks on Facebook’s California-based servers, as well as thefts of email account information and other data from those computers. *See* Section II(A), *supra*.

Cooper

Decl. Ex. 14 at 4243; Ex. 17 at 104:9-105:18; Ex. 19 at 15, 842-43, 1767.

Id. Ex. 19 at 1767. Rather than abandoning ConnectU’s initiative, PNS’ CEO

called it “cool” when he learned the program “imports profiles from thefacebook, friendster, etc. into your CU account.” *Id.* Exs. 14 at 6537, 8392; 18 at 134 (19:08:35-19:09:23); 19 at 842, 1238.

1 The evidence also demonstrates that PNS and Williams expressly targeted Facebook's
 2 California users in early-to-mid 2005, providing a separate basis for foreseeability. *See, e.g.*,
 3 Cooper Decl. Exs. 19 at 1767-69, 310455, 310185-86, 310177-79; 14 at 10359, 8392, 8657. The
 4 very fact that PNS' CEO, whose company offers software and website development, was told the
 5 importer program attacked not merely one major California-based social network (*i.e.* Facebook),
 6 but another well-known one as well (Friendster) also located in the heart of Silicon Valley,
 7 reflects that PNS and Williams at all times knew or should have known that their actions would
 8 have a substantial and profound impact in California generally, and on Facebook specifically. *Id.*
 9 Ex. 18 at 134 (19:08:35-19:09:23). *Cf. Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321
 10 (9th Cir. 1998) (purposeful availment under the "effects doctrine" of *Calder* was satisfied because
 11 Defendant should have known that Panavision, a Delaware partnership in the movie industry who
 12 had its principal place of business in California, would be particularly harmed where "the heart of
 13 the theatrical motion picture and television industry is located"). Like the plaintiff in *Panavision*,
 14 Facebook's principal place of business at the time of PNS' and Williams attacks was in Palo Alto,
 15 California, in the heart of Silicon Valley, the nation's leading technology center.

16 The harm to Facebook was thus even greater than in other locations, given the nature of
 17 its' business. Indeed, further substantiating such harmful effects, the evidence adduced above
 18 demonstrates that registered users of Facebook at California schools were targeted, and that their
 19 California email addresses were harvested, sometimes using false log-in information identified by
 20 California universities. *See* Cooper Decl. Ex. 1 at 241:8-242:24; Ex. 18 at 76 (17:34:22-
 21 17:57:19); Ex. 19 at 281469-73, 310177; Ex. 26 at 172.

22
 23 *Id.* Ex. 26 at 2972.

24 Other courts have found "express aiming" with far fewer intentional acts. For example,
 25 the *Bancroft* court exercised specific jurisdiction over a defendant who sent a letter to Virginia
 26 that had effects in California because it individually targeted — and was "intended to affect" — a
 27 California corporation. *Bancroft*, 223 F.3d at 1087-88. Similarly, the *Brainerd* court found that
 28 even though the defendants had not initiated telephone calls to the plaintiff, the statements they

made during the conversations were “purposefully directed ... into the forum,” therefore making the exercise of personal jurisdiction reasonable. *Brainerd*, 873 F.2d at 1260; *see also Gordy v. Daily News, L.P.*, 95 F.3d 829, 833 (9th Cir. 1996) (holding that specific jurisdiction existed in light of evidence of ‘targeting’ of the plaintiff, who was a forum resident); *Lake v. Lake*, 817 F.2d 1416, 1422-23 (9th Cir. 1987) (holding that specific jurisdiction existed where defendant performed foreign acts for the purpose of having their consequences felt in the forum state). Here, ConnectU aimed its activities at virtually all 2.8 to 3 million of Facebook’s registered users.

2. The Claims Arise Out Of Defendants’ Forum-Related Activities.

A claim “arises out of” activity if injury to the plaintiff would not have occurred “but for” the defendant’s forum-related activities. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002) (“court exercises specific jurisdiction where the cause of action arises out of or has a substantial connection to the defendant’s contacts with the forum”), *citing Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Defendants’ actions, which were directed at Facebook in California, instituted to affect Facebook’s California users, and executed by taking advantage of servers in California, caused the complained of harm.

B. PNS And Williams Are Individually Subject to This Court’s Jurisdiction.

PNS and Williams incorrectly argue that because ConnectU hired PNS, and Williams was a PNS employee taking direction from ConnectU, neither can be held to have purposefully availed themselves of California’s benefits. Mot. to Dismiss at 5, 7. ConnectU cites *Colt Studio v. Badpuppy Enter.*, 75 F. Supp.2d 1104, 1111 (C.D. Cal. 1999), to support this faulty assertion. *Colt* and other relevant authority actually belie PNS’ and Williams’ arguments. *Colt* simply recognizes that under California law a corporate officer or director, as opposed to an employee, cannot be subject to jurisdiction solely because of official actions taken on behalf of the corporation. However, as the very California authority cited by *Colt* further recognizes, “California case law concerning personal jurisdiction over employees of foreign corporations does not expressly state the rule that employees are to be treated differently than officers and directors, but it is clear that employees have not received the same ‘official capacity’ immunity that officers and directors receive.” *Mihlon v. Superior Court*, 169 Cal. App. 3d 703, 713 (1985).

Neither PNS nor Williams were officers or directors of ConnectU, nor was Williams an officer or director of PNS. They are not “shielded,” let alone “doubly shielded,” from personal jurisdiction by virtue of their acts.⁷

Indeed, the United States Supreme Court has totally “reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity.” *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1984), citing *Calder v. Jones*, 465 U.S. 783, 790 (1984); see also *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 521 (9th Cir. 1989). In fact, the Supreme Court in *Calder* actually found jurisdiction over employees who were “primary participants in an alleged wrongdoing intentionally directed at a California resident.” *Calder*, 465 U.S. at 790; see also *Winery v. Graham*, 2007 WL 963252, at *5 (N.D. Cal. 2007) (citing *Calder* at 790). As a result, the assertion of personal jurisdiction based on the primary participant theory is appropriate where the individual had “control of, and direct participation in the alleged activities.” *Winery*, 2007 WL 963252, at *5 (citing *Wolf Designs, Inc. v. DHR Co.*, 322 F. Supp. 2d 1065, 1072 (C.D. Cal. 2004)). Like the petitioners in *Calder*, PNS and Williams were primary participants and should be held accountable in California for their actions.

For the same reason, defendants’ cases relying upon alter ego analysis are irrelevant. Mot. to Dismiss, 7:17, 7:27-28. PNS and Williams actively participated in the scheme to steal email addresses from a California company, including email addresses of Californians, and then proceed to use the email addresses. PNS and Williams are individually liable for their participation in the wrongful acts alleged in this action.

C. The Court May Properly Exercise General Jurisdiction Over PNS

PNS contends that “PNS has no appreciable contacts with California.” Mot. to Dismiss at 5:12-13. Given the totality of the contacts between PNS and California residents just by virtue of PNS development of Importer and Social Butterfly, and contrary to the inaccurate declaration of

⁷ Moreover, other courts in California have subsequently recognized that even the fiduciary shield argument of *Mihlon* and its progeny such as *Colt* is *dicta*, and in fact an inaccurate statement concerning personal jurisdiction. *Seagate Tech. v. A. J. Kogyo Co.*, 219 Cal. App. 3d 696, 701 (1990) (“Our review of the relevant legal principles convinces us that this dictum in *Mihlon* is wrong”); *Taylor-Rush v. Multitech Corp.*, 217 Cal. App. 3d 103, 116-117 (1990) (holding that some corporate officers/directors were subject to personal jurisdiction, and criticizing *Mihlon*).

1 John Taves, general jurisdiction over PNS is appropriate. Yet when PNS' other contacts are
2 considered, the evidence of general jurisdiction is overwhelming.

3 General jurisdiction exists over a defendant where it has engaged in "continuous and
4 systematic general business contacts" in the forum. *Helicopteros Nacionales de Columbia, S.A. v.*
5 *Hall*, 466 U.S. 408, 416 (1984) (citing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437
6 (1952)). In considering whether it has general jurisdiction over a defendant, the court should look
7 at all of the defendant's activities that impact the state, including whether the defendant makes
8 sales, solicits or engages in business in the state, serves the state's markets, designates an agent
9 for service of process, holds a license, or is incorporated there. See *Hirsch v. Blue Cross, Blue*
10 *Shield of Kansas City*, 800 F.2d 1474, 1478 (9th Cir. 1986), cited in *Bancroft*, 223 F.3d at 1086.
11 Indeed, "[p]resence" in the state ... has never been doubted when the activities of the corporation
12 there have not only been continuous and systematic, but also give rise to the liabilities sued on,
13 even though no consent to be sued or authorization to an agent to accept service of process has
14 been given." *Int'l Shoe Co.*, 326 U.S. at 317.

15 1. PNS Conducts Substantial Business In California — The Economic 16 Realities

17 In analyzing whether PNS' contacts are "substantial" or "systematic and continuous," the
18 Court must determine whether the "contacts constitute sufficient activity in [California] to
19 conclude that the defendants 'may in fact be said already to be 'present' [in California].'" *Gates*
20 *Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 1984). In examining business contacts
21 with the forum state a court must "focus upon the 'economic reality' of defendants' activities
22 rather than a mechanical checklist." *Id.* Even indirect contact with forum residents is sufficient
23 where the defendant engages in economic activity that generates gross income. *Foster v. Mooney*
24 *Aircraft Corp.*, 68 Cal. App. 3d 887, 892-93 (1977); see also *Paneno v. Centres for Academic*
25 *Programmes Abroad Ltd.*, 118 Cal. App. 4th 1447, 1455 (2004), citing *Vons Companies, Inc. v.*
26 *Seabest Foods, Inc.*, 14 Cal.4th 434, 446 (1996).

27 PNS has substantially exploited California businesses and residents for its own economic
28 gain. Though Taves contends in his declaration that "PNS does not own, lease or maintain an

1 office, residence or place of business in California, and has not owned, leased or maintained an
 2 office, or place of business in California,” the evidence demonstrates otherwise.⁸ Taves Decl. ¶ 4.
 3 PNS has now, or has had in the past, several California “virtual offices.” See Section II.B.1,
 4 *supra*.

5 *Id.*

6
 7 *Id.*; see also Cooper
 8 Decl. Ex. 21 at 251:12-13. PNS has engaged at least five other contractors in the last few years
 9 who lived and worked in California, including Greg Deacon, Sam Oh, Joel Stair, Fred Pampo,
 10 and David Perkins. See Section II.B.1, *supra*. PNS also has routinely purchased equipment (such
 11 as computers) for its contractors to use when performing work on its behalf. *Id.* Based on these
 12 facts, there is no merit to PNS’ assertion that it does not maintain an office in California.

13 Taves also incorrectly concluded that “PNS has not and does not derive substantial
 14 revenue from goods used or consumed in California or services rendered in California.” Taves
 15 Decl. ¶ 8.

16
 17 Cooper Decl. Ex. 21 at 237:18-238:13. In fact, PNS has generated more than 7.5% of its
 18 total gross revenue of all time (or 33% of its average annual revenue) from its contacts with
 19 California. *Id.* Ex. 21 at 306:24-307:1; Ex. 22 at No. 3.

20 *Id.* Exs. 19 at 1845-56; Ex. 21 at 257:12-14.

21 Taves also declared that “PNS has signed perhaps one or fewer contracts regarding a
 22 California entity.” Taves Decl. ¶ 9. The fact that PNS included the word “signed” to limit its
 23 contracts with California is an indication that this statement is less than candid. In fact, PNS
 24 generally enters into contracts with all of its clients, but these contracts tend to be handshake
 25 agreements rather than “signed” documents. See Section II.B.2, *supra*. In truth, PNS has at least
 26 11 California-based customers, perhaps many more than that, and PNS admitted that it may enter

27 ⁸ PNS claims that one of the benefits of hiring is that it does not maintain offices anywhere —
 28 PNS operates “virtual” offices. Cooper Decl., Ex. 27. These virtual offices amount to a virtual
 presence in California, if not an actual one.

1 into more than one agreement with a customer (*e.g.*, AST). *Id.*

2 PNS also relies on California-based companies, such as Google and Craigslist, to
3 advertise its services and employment needs. *See* Section II.B.3. and 4., *supra*. In order to
4 advertise on these sites, PNS must enter into contracts with these companies — contracts that are
5 governed by California law. *Id.* Such ongoing relationships with California companies,
6 advertisers and search engines indisputably generate revenue for PNS.

7 *See*
8 Section II.B.2(a), *supra*. PNS is The Records Portal Company's "engineering team" (*i.e.*,
9 Records Portal's exclusive software development company), PNS partner Hayner is a member of
10 Records Portal's management team, and PNS is the administrative contact for Records Portal's
11 domain registration. *Id.*

12 Cooper Decl. Ex. 19 at 1215.

13 The evidence thus overwhelmingly supports the "economic reality" that PNS does
14 substantial business with California businesses, and has a substantial presence in California. The
15 exercise of personal jurisdiction thus is proper.

16 **D. The Exercise of General and Specific Jurisdiction Is Reasonable⁹**

17 Determining reasonableness of jurisdiction is based upon seven factors: (1) the extent of
18 purposeful interjection; (2) the burden on the defendant to defend the suit in the chosen forum; (3)
19 the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in
20 the dispute; (5) the most efficient forum for judicial resolution of the dispute; (6) the importance
21 of the chosen forum to the plaintiff's interest in convenient and effective relief; (7) and the
22 existence of an alternative forum. *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848,
23 851-52 (9th Cir. 1993).

24 Taking these factors together, the exercise of jurisdiction is reasonable. The torts were
25 inflicted against an entity operating in California involving California users and was effectuated,
26 in part, from California. "The site where the injury occurred and where evidence is located

27
28 ⁹ As set forth above, since the first two prongs of specific jurisdiction are met, reasonableness is
presumed for specific jurisdiction.

usually will be the most efficient forum.” *Amoco*, 1 F.3d at 852, citing *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985). PNS and Williams purposefully interjected themselves into California repeatedly by attempting to acquire the 2.8 to 3 million email accounts available from Facebook’s California-based website, and then spamming the registered users. California has a strong interest in preventing the types of harm alleged in the complaint and borne out by the jurisdictional evidence. Defendants bear little or no burden by defending themselves in California, especially given the fact they already have a substantial presence in the state. Indeed, they are represented by California counsel. Because of the substantial issues associated with the how the attacks on Facebook occurred, California easily is the most efficient forum for judicial resolution. In fact, there may not be a true alternative forum, given the existence of state claims based on computer security laws unique to California, such as the claim for violation of Cal. Penal Code Section 502(c). This case will also move forward against other defendants already before this Court, making this Court the most efficient forum for resolution, and the forum best placed to provide effective and convenient relief.

IV. CONCLUSION

For these reasons, both general and specific jurisdiction exists over PNS and Williams. Defendants’ motion to dismiss should be denied.

Dated: June 25, 2007

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Monte M.F. Cooper /s/

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on June 25, 2007.

Dated: June 25, 2007.

Respectfully submitted,

/s/ Monte M.F. Cooper /s/

Monte M.F. Cooper

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